SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1952

No. 410

ADAM THOMAS, *Petitioner,*

v.

HEMPT BROTHERS, a partnership, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to reverse the judgment of the Pennsylvania Supreme Court entered on June 24, 1952. (Petition for re-argument denied on August 22, 1952.)

OPINIONS BELOW

The trial court entered judgment in favor of the respondent on August 29, 1951, which is unreported. The Pennsylvania Supreme Court entered judgment in favor of the respondent on June 24, 1952, which judgment is

part of the record. It is this latter judgment which petitioner seeks to have set aside.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 24, 1952, and a rehearing denied August 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

SPECIFICATIONS OF ERROR AND QUESTIONS PRESENTED

Specification I

This litigation involves a legal question of first impression, thereby making desirable an early and definitive ruling by the Supreme Court.

Specification II

The Pennsylvania Supreme Court's refusal to follow the latest decision on the subject by the highest Federal Court.

Specification III

This litigation presents a question of vital public importance not only to the litigants involved but to all em-

ployers and employees engaged in both inter and intrastate activities, and to the Department of Labor of the United States of America in the enforcement of the provisions of the Fair Labor Standards Act of 1938 as amended.

Specification IV

A conflict exists between the decisions of the Pennsylvania Supreme Court (*Thomas* v. *Hempt Bros.* 371 PA. 383, 89 A(2) 776, this case), and the decisions of the United States Court of Appeals for the Third Circuit (*Tobin* v. *Alstate* 195 F(2), 577 decided April 9, 1952), and of the United States Court of Appeals for the Eighth Circuit (*Tobin* v. *Johnson* 11 WH cases 38, 22 Labor cases 67067, Supreme Court, No. 336, this term, not officially reported). The Supreme Court of the United States has not passed upon the legal questions involved herein.

Specification V

Petitioner's constitutional right to trial by jury was denied by the trial court.

STATEMENT OF THE CASE

Petitioner brought proceedings in the Court of Common Pleas of Cumberland County, Pennsylvania, to recover compensation for overtime wages, liquidated damages and counsel fees pursuant to Section 16B of the Fair Labor Standards Act of June 25, 1938, 29 U.S.C. Sections 206, 207, 216. Compensation for overtime is claimed for the period beginning May 11, 1941, and ending April 15, 1945, after which period the respondent began to pay petitioner

one and one-half times the regular hourly rate for any hours in excess of forty in any work week. After a series of interlocutory orders extending from a period in 1947 through 1951, the Court of first instance sustained a demurrer to the complaint filed by the petitioner. In sustaining the said demurrer the Court ruled as a matter of law that the petitioner, being an "off-the-road employee," was not within the coverage of the Fair Labor Standards Act.

Plaintiff was employed on the premises and engaged in giving directions to company truck drivers concerning the destination of materials manufactured by the employer to customers of the company engaged in interstate commerce; in receiving orders from the company office and keeping a record of the filling of said orders; directing and performing the function of mixing materials manufactured both in the proportions and quantities called for by the various customers. Specifically the plaintiff each and every single day during the specified period was given orders received by the company for concrete. Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, said customers daily including, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, railroads, airports and various other interstate channels.

The respondent took the position in the trial court and in the Supreme Court of Pennsylvania that inasmuch as the pleadings revealed affirmatively that the petitioner

was an "on the premises employee" that he was outside of the scope of the Fair Labor Standards Act. The question involved, therefore, is whether or not the complaint states a cause of action within the scope of the provisions of the Fair Labor Standards Act, supra. The Supreme Court of Pennsylvania ruled that an "off-the-road employee," even though engaged in the producing and handling of materials used to repair and maintain the channels of interstate commerce, is not engaged in the production of goods for commerce or engaged directly in interstate commerce. *Thomas* v. *Hempt Brothers* 371 PA. 383, 89A(2) 776 (1952).

REASONS FOR ALLOWANCE OF WRIT

The Pennsylvania Supreme Court in its decision refused to follow the decision of the United States Circuit Court of Appeals for the Third Circuit. The latter Court had ruled on this precise question April 9, 1952, (*Tobin* v. *Alstate* 195 F(2) 577) noting that the case was one of first impression. This Court has held on many occasions that in the absence of a decision by the highest court of the state, Federal Courts are bound by the decisions of the State intermediate appellate court in ascertaining the meaning of a State statute.

Six Companys v. *Field* 311 U.S. 169
West v. *A.T.&T. Co.* 311 U.S. 233
Stoner v. *New York Life Insurance Company* 311 U.S. 464

Similarly, the State Courts must follow the Federal Court's interpretation of Federal Statutes, otherwise there can be no uniformity in the application of Federal Statutes. *Dice* v. *Akron, Canton and Youngstown Railroad* 98 U.S. S.Ct. (L.Ed. Adv. Opn.) 285. The Pennsylvania

Supreme Court gave merely lip service to this principle in the instant case and then proceeded to ignore the reason for the rule and rejected the decision of the Third Circuit Court of Appeals in the *Alstate* case in favor of what it regarded as a sounder decision by the Tenth Circuit Court in the case of *E. C. Schroeder Co.* v. *Clifton* 153 Fed. (2) 385, Certiorari denied 328 U.S. 858, decided in 1946, and which was not controlling in the opinion of the Third Circuit Court of Appeals.

In taking this position the Pennsylvania Supreme Court violated the established principle that there should not be one "rule of law for litigants in the State Courts and another rule of law for litigants who bring the same question before the Federal Courts." This is exactly the situation which now prevails in Pennsylvania.

In the interest of uniformity, it is respectfully suggested that summary reversal of the decision of the Pennsylvania Supreme Court is the appropriate remedy, in this case. This is particularly so where as here the very excuse stated by the State Court for departing from the controlling Federal decision in its Circuit upon a Federal question of law conflicts with the *sole* Federal decision upon the question. The Supreme Court of Pennsylvania in rejecting the *Alstate* decision, rejected it as well as the statement in the *Alstate* case that "the precise question has never been passed upon by an Appellate Court." The Federal Court in the *Alstate* case held that the *Schroeder* case was not in point because it involved the production of rock for use in original construction which was not the legal question involved in either the *Alstate* case or the *Hempt Brothers* case (this case). Thus on the precise point of the existence of a conflict between Federal decisions (which the State Court gave as justification for rejecting the governing Federal appellate decision) the Pennsylvania Supreme Court re-

fused to follow and flatly rejected the *only* Federal appellate decision on point.

Subsequently, the Eighth Circuit Court in the case of *Tobin* v. *Johnson* 11 WH cases 38, 22 Labor cases 67067, Supreme Court, No. 336, this term, not officially reported passed upon the question ruled on in the *Hempt Brothers* case and the *Alstate case*. The opinion in the *Johnson* case refers to the *Schroeder* decision only to express its agreement with the conclusion reached in the *Alstate* case and it makes no mention of the *Hempt Brothers* decision. Thus no support for the Pennsylvania Supreme Court's decision is found in either of the two latest Federal decisions which have passed upon the legal question involved in these proceedings.

Another reason appears which would suggest that the instant case should be summarily remanded to the State Court without independant resolution of the issue. This is the absence in the *Hempt Brothers* case of any record presenting "a solid basis of findings based on litigation or a comprehensive statement of agreed facts." *Kennedy* v. *Silas Mason Company* 334 U.S. 249. In the instant case important issues are involved but here the record is less complete than in the *Kennedy* case. Here the Pennsylvania Court has sustained dismissal of the complaint on the pleadings and without trial or any factual presentation whatsoever. In the *Johnson* case, on the original appeal, the Circuit Court reversed the District Court, stating:

> "The issues tendered by the complaint are too important and far reaching to be decided upon an assumed state of facts gleaned from a pleading."
> See *McComb* v. *Johnson* 174 F (2) 833.

For these reasons it is respectfully submitted that this Court should summarily remand the record to the State Court and reverse the judgment of the Pennsylvania Supreme Court.

The precise issue presented by the instant case has never been passed upon by this Court. While this Court has never resolved the precise question involved in these proceedings, nevertheless, the language of the Supreme Court in several of its recent decisions arising under the Fair Labor Standards Act leads inevitably to the conclusion that coverage was intended for "off-the-road employees" such as herein involved.

In *Roland Electrical Company* v. *Walling* 326 U.S. 657 at page 663, this Court stated as follows:

> "This does not require the employee to be directly engaged in commerce among the several states. This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other articles or subjects of commerce of any character which are produced for trade, commerce or transportation among the several states."

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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